Supreme Court, U.S.
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No. 94-1335

In The

Supreme Court of the United States

October Term, 1994

THE STATE OF ARIZONA,

Petitioner,

vs.

SHIRLEY AVERYT and ROBERT AVERYT,

Respondents.

On To Petition For Writ Of Certiorari
To The Arizona Court Of Appeals

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Respondents disagree, in part, with the manner in which the State has framed the issues. The Arizona Court of Appeals, in rendering its decision, did not rely solely on *Lambert v. California* or any other federal case. Therefore, issue 1 should be presented as follows:

> **Is the State of Arizona required to prove that Defendants knew they had a legal duty to file Arizona income tax returns?**

As to issue 2, once again, the State has misframed the issue. The Court of Appeals did not conclude that a "good faith" defense in a prosecution for failure to file income tax returns was available merely as a matter of federal constitutional law. Therefore, the issue reframed is:

> **Is a Defendant charged with failing to file Arizona income tax returns allowed a "good faith" defense?**

Viewing this case from a policy view rather than the narrow legal issues, the true question presented to the United States Supreme Court is whether the Court will hear a case in which the sole issue is what are the elements of the crime failure to file an Arizona income tax return. This issue is truly unique to Arizona and determination of the elements of the crime of failure to file Arizona income tax returns should be left to the Arizona court system.

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FACTS MATERIAL TO THE ISSUES PRESENTED

The facts set forth at pages 4 through 13, inclusive, are, to a large extent, correct. However, there are particular matters which the State has not fully developed, thus leaving this Court with incorrect implications.

At all times Mr. and Mrs. Averyt were interviewed by Department of Revenue investigators, they were always cooperative and answered all questions.

The State declares Mr. and Mrs. Averyt sent their children to a private school. The State conveniently neglects to inform this Court the full tuition rate was not charged and Defendants paid what they could.

The State indicates the gross income of the Defendants in each of the years under question. However, the Department of Revenue examiner made no effort to reduce the gross income by the deductible business expenses or itemized deductions in order to determine the proper taxable income. Thus, the Averyts' taxable income appears larger than it actually was.

The State also makes much of the Averyts' purchase of a home at Arrowhead Ranch for $136,000, but once again, neglects to inform this Court the Averyts' purchased it with a down payment of $1,200.

The Arizona Supreme Court heard oral argument and on the very next day ruled the granting of review was improvident and denied the petition for review.

ARGUMENTS

I

IS THE STATE OF ARIZONA REQUIRED TO PROVE THAT DEFENDANTS KNEW THEY HAD A LEGAL DUTY TO FILE STATE INCOME TAX RETURNS?

The Petitioner relies upon the Arizona Court of Appeals cite of *Lambert v. California*, 355 U.S. 225 (1957) for the conclusion the Arizona Court relied solely on federal law to determine the elements of an Arizona crime. The Arizona Court of Appeals did not rely solely upon *Lambert* for its decision. Arizona case law firmly establishes the principle that when a duty arises strictly from statute, conviction of a crime of omission (failure to affirmatively act) cannot be sustained without proof of Defendant's knowledge of his duty.

1. *State v. Garcia*, 156 Az. 381, 752 P.2d 34 (App. 1988) – The factual basis for guilty plea was insufficient in prosecution for failing to register as a sex offender, absent a showing that the Defendant had knowledge of need to register as a sex offender or proof of probability that he had knowlege of requirement and thereafter failed to do so;

2. *State v. Williams*, 144 Az. 487, 698 P.2d 732 (1985) – Offense of "driving without a license" necessarily involves a calpable mental state so that, in order to convict, the State must show the driver knew or should have known that his license had been suspended;

3. *State v. Jennings*, 150 Az. 90, 722 P.2d 258 (1986) – The prosecution of a person, whose license was mandatorily revoked, for driving under the influence of intoxicating liquor with revoked license requires proof he knew or should have known his license had been revoked; and

4. *Arizona v. Fendler*, 127 Az. 464, 622 P.2d 23 (1980) – Failure to file state corporate income tax return must be intentional and deliberate rather than due to negligence, carelessness, or good faith mistake and thus in order to convict, the jury must find that Defendant intentionally and deliberately failed to file required return knowing he was legally obliged to do so.

The decision by the Arizona Court of Appeals to require the State of Arizona to demonstrate the Defendants knew they had a legal duty to file state income tax returns which they intentionally disregarded is not premised upon federal constitutional law nor is it a deviation from state law. As cited above, the Arizona courts affirmatively accept the proposition that to be convicted of the crime involving the failure to act when the duty to act is created solely by statute, the state must demonstrate the Defendant knew his legal obligation. The State's reliance on a potpourri of federal citations is misplaced.

On page 20 of its Petition for Writ of Certiorari, the Petitioner states "the Arizona Court of Appeals' opinion makes it clear that, absent any federal constitutional mandate under *Lambert*, there is no requirement for the State of Arizona to prove that the defendant actually knew he had a legal duty to file a state income tax return." This

statement by the Petitioner is clearly erroneous and its entire petition is based upon this erroneous assumption.

For this Court to accept this proposition, it would have to conclude that the three members of the Arizona Court of Appeals and the five members of the Arizona Supreme Court who heard oral argument do not understand Arizona law as it relates to scienter and the duty to act when that duty is created solely by statute. The day after the Arizona Supreme Court heard oral argument on the Petition for Review it ruled that the "grant of review in this case was improvident" and "the petition for review was denied". The Respondents request that this Court allow the members of the Arizona judicial Appellate system determine the element of an Arizona crime based upon Arizona statutes.

II

IS A DEFENDANT CHARGED WITH FAILING TO FILE STATE INCOME TAX RETURNS ALLOWED A "GOOD FAITH" DEFENSE?

Once again, the State is relying upon the Court's citation of a federal case to conclude the Court's decision is based solely upon a misconception it had no choice but to rule as it did because of federal constitutional law. The Court of Appeals determined that if state law accepts the defense asserted by the Respondents, it only naturally flows the Defendants are entitled to present a "good faith" defense to the prosecution for failure to file a state income tax return. The Court of Appeals did not rely upon *Cheek v. United States*, 498 U.S. 192 (1991) for the

proposition that the Defendant is entitled to present evidence of their good faith. Rather, the Court relied upon *Cheek* for the proposition that preventing the jury from considering evidence which might negate the *mens rea* of a crime would undermine the protections embodied by the Sixth Amendment's right to jury trial.

Once again, the Petitioner is trying to circumvent the unanimous decision of the eight Arizona appellate judges that considered this case by asserting the proposition that all eight jurists misapplied federal law, when, in fact, the jurists properly appled state law.

CONCLUSION

For all the above stated reasons, Shirley and Robert Averyt respectfully request this Court to deny the Certiorari Petition filed by the State of Arizona on the grounds that said decisions do not address any interesting and fundamental issue of federal constituional law and that the Court of Appeals' decision regarding the Arizona crime of failure to file state income tax returns is firmly grounded upon Arizona law.

Respectfully submitted,

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